

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

Implementation of Section 309(j))
 of the Communications Act --)
 Competitive Bidding for Commercial)
 Broadcasting and Instructional Television)
 Fixed Service Licenses)
)
 Re-examination of the Policy)
 Statement on Comparative)
 Broadcasting Hearings)
)
 Proposals to Reform the Commission's)
 Comparative Hearing Process to)
 Expedite the Resolution of Cases)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: The Commission

**REPLY COMMENTS OF VARIOUS
POST-JULY 1, 1997 FM APPLICANTS**

These reply comments are filed on behalf of 24 FM applicants that have filed applications for new after FM stations July 1, 1997 in response to FM cutoff windows.¹ The comments filed on

¹ The commenting applicants are: Big Ben Broadcasting, New London, IA, (December 29, 1997); Crow Creek Broadcasting, Wessington Springs, SD, File No.: 971229MG; New Wave Broadcasting, Newaygo, MI, File No.: 971218MF; Oak Tree Broadcasting, Oakley, UT, File No.: 971120MG; Vin Broadcasting, Vinton, IA, File No.: 971107MH; Rekab Broadcasting, Baker, CA, File No.: 971107MC; Poor Mountain Broadcasting, Shawsville, VA, File No.: 971023MC; Pine Broadcasting Company, Pocono Pines, PA, File No.: 971009MJ; Truckster Broadcasting, Truckee, CA, File No.: 971003MF; Kentucky Broadcasting, Lexington, IL, File No.: 970911M2; Boat of Steam Broadcasting, Steamboat Springs, CO, File No.: 970911ML; Port Wine Broadcasting, Portsmouth, OH, File No.: 970911MZ; Mountain of Snow Broadcasting, Snow Hill, MD, File No.: BPH-970911M4; Torro Broadcasting, Orofino, ID, File No.: 970904MH; General Randolph Broadcasting, Randolph, UT, File No.: BPH-970904MK; Pacific Bay Broadcasting, Coos Bay, OR, (July 30, 1997); Radio Oro Broadcasting, Oro Valley, AZ, File No.: BPH-970724NA; Big Bula Broadcasting, Ashtabula, OH, File No.: 970724MW; By the Bay Broadcasting, Bayboro, NC, File No.: 970724MV; Magic City Media, Forest City, PA, File No.: 970717MK; Michael Radio Group, Glenrock, WY, File No.: 971010MG; Magic City Media, Laramie, WY, File No.: 971107MI; Michael Radio Group, Lost Cabin, WY, File No.: 971120MF; Michael Radio Group, Newcastle, WY.

July 26, 1998 opposed reopening any closed window and support allowing settlements between applicants already on file.

None of the parties, filing a total of nearly 1400 pages of comments in this proceeding, support reopening windows for FM stations that have already closed. On the contrary, at least 21 different commentators oppose reopening windows to allow new applicants to file.² The arguments are persuasive. Nearly all of them point out that reopening a window which the Commission has specifically established in a Report and Order would be arbitrary and capricious. Applicants currently on file have expended considerable resources to file applications, prepare engineering, and expend the time and resources necessary to timely submit an application. Any new applicant could simply piggyback on the shoulders of earlier filed applicants at no or very little expense, prejudicing the applicants on file and putting them at a disadvantage. Furthermore, there would be no significant benefit in reopening windows since this would only result in delay and since applicants genuinely interested in the stations have presumably already filed applications.³

As further noted in the "Joint Comments of Certain Broadcast Applicants" the Commission action in adopting service and auction rules for the 220 MHz service is not applicable here. There, the Commission declined to hold an auction limited only to those applicants with pending

² Friendship Broadcasting, L.L.C.; Kidd Communications; George S. Flinn, Jr.; Hatfield & Dawson Consulting Engineers, Inc.; Throckmorton Broadcasting, Inc.; Communications Technologies, Inc.; Edward Czelada; The Scranton Times, L.P.; Williams Broadcasting Company; Todd Stuart Noordyk; Positive Alternative Radio, Inc., et al.; Batesville Broadcasting Company, Inc.; Donald James Noordyk; Michael R. Ferrigno; Jay Man Productions, Inc.; Grace Communications, L.C.; KM Communications, Inc.; James G. Cavallo; Andrew Bernhard, et al. and Dakota Communications, et al.

³ The Commission's reliance on *Direct TV vs. FCC*, 7 CR 758 (DC Circuit 1997) cited in footnote 11 of the NPRM does not provide support for reopening filing windows. The Court in that case specifically noted that "the Commission did not reopen a previously closed processing round...." *Id.*, 7 CR 758 at 766.

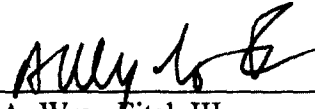
applications, but instead, allowed the filing of applications by additional parties.⁴ In reopening the opportunity to file for this service, the Commission emphasized that the rules adopted for the service significantly altered the technical and operational rules as they previously existed. Therefore, the Commission reasoned it would be unfair to foreclose additional applicants. Here, the Commission's reasoning is inapplicable. The service involved (FM broadcasting) remains the same. There has been no change in any of the technical requirements in operating a station. Furthermore, it was evident before any of the existing applications were filed, and before any of the windows closed, that any post July 1, 1997 proceeding would be decided by auction. Therefore, no potential new applicant can claim to be prejudiced by being foreclosed from a new service or by new auction procedures which may be adopted.

It appears that the only rationale for reopening windows would be to possibly generate higher revenues in an auction by attracting more applicants. However, Congress has specifically directed the Commission not to consider auction revenues for establishing its policies. *The Communications Act of 1934* as amended, §309(j)(7)(A) states, "The Commission may not base its finding on public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection."

A review of the Comments also reveals nearly unanimous, if not unanimous, support for allowing applicants to settle any proceeding at least up until the time FCC Forms 175 are filed. Settlement has always been deemed by the Commission to be in the public interest by allowing for an earlier inauguration of a new broadcast service.

⁴ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, GN Docket No. 93-252, and PR Docket No. 93-253, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, FCC 97-52 (1997) (hereinafter *Third Report and Order*). The Commission decided to dismiss the pending applications without prejudice and allow them, as well as additional interested parties, to file applications in the 220 MHz auction.

Respectfully submitted,

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